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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. [redacted]252

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, GAL-MAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, WEYERHAEUSER STEAMSHIP COMPANY, *et al.*,

Petitioners,

against

PANAMA CANAL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, and WEYERHAEUSER STEAMSHIP COMPANY, NATIONAL BULK CARRIERS, INC., AMERICAN-HAWAIIAN STEAMSHIP COMPANY, ORE TRANSPORT, INC., AMERICAN TANKERS CORPORATION OF DELAWARE, ATLANTIC CARGO CARRIERS CORPORATION, COLONIAL STEAMSHIP CORPORATION, CORAL STEAMSHIP CORPORATION, GREENWAVE STEAMSHIP CORPORATION, INSULAR STEAMSHIP CORPORATION, JUPITER STEAMSHIP CORPORATION, MERCHANTS STEAMSHIP CORPORATION, NORTHEASTERN STEAMSHIP CORPORATION, NORTH SEAS NAVIGATION CORPORATION, OCEANIC WATERWAYS CORPORATION, ORION SHIPPING & TRADING CO., INC., PANOCEANIC STEAMSHIP CORPORATION, PHOENIX STEAMSHIP CORPORATION, SEAFARER STEAMSHIP CORPORATION, SEAFORTH STEAMSHIP CORPORATION, SEATRANSPORT CORPORATION, SEVEN SEAS STEAMSHIP CORPORATION, SOUTHATLANTIC NAVIGATION CORPORATION, SOUTHERN CARGO CARRIERS CORPORATION, STATES CARGO CARRIERS CORPORATION, STONE STEAMSHIP COMPANY, INC., THREE OCEANS STEAMSHIP CORPORATION, UNIVERSAL CARGO CARRIER CORPORATION, YARMOUTH STEAMSHIP CORPORATION and INDEPENDENT TANKSHIPS, INC.,

Petitioners,

against

PANAMA CANAL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners above named respectfully submit their petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit in this case in so far as it dismisses their claim for damages for failure to prescribe tolls in accordance with Section 412(b) of Title 2 of the Canal Zone Code.

Opinions Below

The opinion of the District Court (165a-187a) is reported at 145 F. Supp. 539.

The opinion of the Court of Appeals (Appx. A, 1-24) has not yet been reported.

(References to appendices to this brief are cited "Appx. A" etc.; references to the appendix to petitioners' brief in the Court of Appeals are cited "165a" etc.)

Jurisdiction of This Court

The decree of the Court of Appeals sought to be reviewed was entered on April 8, 1957 (Appx. A, 1).

The jurisdiction of this Court is invoked pursuant to Title 28, Sections 1254(1) and 2101, of the United State Code.

Questions Presented for Review

The opinion of the Court below and the petition of the Panama Canal Company, hereinafter referred to as "defendant," state the circumstances generally.

Basically, the case revolves around the defendant's unlawful and unreasonable application of the surplus revenues of Canal operation to the losses of its non-Canal ventures, rather than to reduced tolls as required by law.

Defendant was required by Sections 411 and 412, Title 2 of the Canal Zone Code, as enacted by the Act of September 26, 1950, to fix tolls according to a formula stated therein; in substance the formula provided that tolls should reflect the costs of Canal operation. Section 14 of the Act of 1950 provided that the formula should be effective upon a date that proved to be July 1, 1951. For many years defendant has failed to apply the statute, meanwhile collecting tolls greatly in excess of costs as defined by the statute, and concealing its action by "ambiguous bookkeeping," as the Court of Appeals put it. The General Accounting Office audit report for 1954 fixed the amount of the excess from July 1, 1951—June 30, 1954 as $27,836,504, about $25,000 a day, *infra*, p. 9.

Petitioner shipping companies, hereinafter referred to as "plaintiffs", brought suit to compel defendant to prescribe tolls according to the statutory formula and to recover damages for its past failure to do so.

The Court sustained plaintiffs' suit to compel action with respect to the future but denied relief with respect to past damages.

The apparent basis for this decision was a proviso in Section 411 as follows:

> "Provided further, That * * * changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive."

The Court below apparently construed this proviso to permit the President in his review of rates of tolls fixed by defendant to disregard the costs formula of Section 412. Thus the Court referred the President's action as a "veto" (Appx. A, 13, 22) and a "political decision" (Appx. A, 18).

From this premise the Court reasoned that it was impossible to calculate damages because "there is no way of knowing whether or not the President would have approved" tolls fixed by defendant (Appx. A, 23).

The Court also asserted that "we find no evidence of a congressional intent to allow recovery of overcharges" (Appx. A, 23).

Therefore the Court granted no relief with respect to such damages. That decision presents the following questions:

1. Was not the President's review power under Section 411 merely to see to it that any new rate prescribed by defendant complied with the Section 412 formula in accordance with the power and duty vested in him by Article II, Section 3, of the Constitution that he "take Care that the Laws be faithfully executed", as distinguished from an authorization to the President to nullify Congressional tolls policy and to prescribe tolls that did not comply with law?

2. Construed as it has been by the Court below, is the proviso unconstitutional as a delegation of power and duty vested in Congress by Article I, Section 1, of the Constitution, granting Congress "all legislative Powers," and by Article IV, Section 3, granting Congress power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States", *United States* v. *Grimaud*, 220 U. S. 506; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388?

3. Construing the Section 411 proviso as argued by plaintiffs, to mean that the President should see to it any new rate prescribed by defendant complied with the Section 412 formula, or, finding it unconstitutional and void, is there an adequate basis for the calculation of damages?

4. Did not Congress show its intention that defendant is liable for overcharges by (1) providing for the transfer of the Canal to defendant, a corporation fully subject to suit, (2) imposing upon defendant a duty to prescribe tolls according to a formula, (3) providing that that duty should be effective upon the transfer to defendant, and (4) imposing upon defendant the status of a public utility by incorporation of Article III, Section 1, of the Hay-Pauncefote Treaty in Section 412(d)?

(Defendant has maintained that, in respect of damages, the United States is a necessary party. The Court of Appeals did not rule on this point. Cf. Point VII, *infra*, pp. 33-34).

Statutes Involved

The case concerns the Constitution and many statutes. The primarily applicable excerpts from those chiefly at issue are quoted at Appendix C, *infra*, pp. 28-34. Here we list them with appropriate references:

Constitution: Article I, Section 1; Article II, Sections 1 and 3; and Article IV, Section 3 (Appx. C, 28).

Act of June 29, 1948: Section 2 (62 Stat. 1075-1077), enacting Sections 245, 247 and 253, Title 2, Canal Zone Code (Appx. C, 28-29).

Act of September 26, 1950: Sections 2, 10, 11, 12 and 14 (64 Stat. 1038-1043), of which Sections 10, 11 and 12 enact or amend Sections 256, 411 and 412, Title 2, Canal Zone Code (Appx. C, 29-32).

Administrative Procedure Act: Sections 2 and 10, 5 U. S. C. §§1001, 1009 (Appx. C, 32-33).

Title 28, United States Code (Judicial Code), §1331 (Appx. C, 33).

Treaty between United States and Great Britain concluded November 18, 1901 (Hay-Pauncefote Treaty): Article III, Section 1 (33 Stat. 1903) (Appx. C, 33).

Executive Order No. 10263 (16 F. R. 6333) (Appx. C, 34).

Because prior statutes regulating Canal tolls are not at issue here, but are relevant for background purposes, they are collected separately in Appendix D, 35-38.

Statement of Case

Defendant unlawfully and unreasonably withheld the prescription of reduced tolls, meanwhile applying the surplus revenues of its Canal operation to the losses of its other activities, and concealing its action by "ambiguous bookkeeping." The excess tolls charged from 1951 to 1954 were $27,836,504, or about $25,000 a day.

The statement of facts in this petition relates only to defendant's unlawful failure to reduce tolls and its unwarranted application of the surplus revenues of the Canal to its collateral activities. Defendant, as noted by the Court of Appeals, by "ambiguous bookkeeping concealed" this action (Appx. A, 14) until the publication of the General Accounting Office audit report for 1954 on May 13, 1955 (44a). This report, showing excess collections for the period July 1, 1951 to June 30, 1954 of $27,836,504 (35a), or $25,000 a day, was followed by the institution of this suit on September 13, 1955 (1a).

The tolls policy embodied in Section 412, Title 2, of the Canal Zone Code, became effective on the transfer of the Canal to defendant (Section 14, Act of September 26, 1950), an event that occurred on July 1, 1951 (16 F. R. 6333).

This policy called for fixing tolls on the basis of Canal operations and without regard to the losses or profits of defendant's activities that were "collateral" (the word is taken from the report of the Armed Services Committee to the Senate on the bill that became the Act of 1950; 141a).

In the language of the Court of Appeals (Appx. A, 13-14):

> "A certain latitude was allowed the defendant in deciding how frequently to change tolls, but this was limited by the requirement that in the long run tolls must reflect costs. . . . That the defendant would defer toll changes in order to apply canal profits to cover its losses in other enterprises never occurred to the legislators. . . . Until the GAO audit the defendant's ambiguous bookkeeping concealed the fact that the Treasury was being deprived of profits* made in operating the canal, so that consumers of goods and services furnished by the other ventures could enjoy them below cost—the very type of subsidy the Government Corporation Control Act and the 1950 amendments to the Panama Canal Act were designed to prevent. The men who spent three years hammering out a compromise toll formula for future operation of the canal did not mean to give the defendant's board of directors *carte blanche* to ignore the statutory mandate whenever defendant's other business ventures were losing money."

A like analysis had already been made by the General Accounting Office. In its audit report for 1954 it said in part (46a):

> "We interpret the legislation as precluding any losses sustained by the Panama Canal Company in the operation and maintenance of business facilities being included in the basis for determining tolls

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*Plaintiffs maintain that under Section 412(b) the excess revenues should be applied to reduced tolls, and not remitted to the U. S. Treasury. The context of its opinion indicates that the Court of Appeals has the same view. Plaintiffs do not understand this allusion to the Treasury.

> under Section 412(b). Based on the financial results of the Canal activity for the past three years, toll rates would have to be reduced substantially if hearings were held at this time."

The GAO calculation of the excess collections at $27,836,504 for the three years 1951-1954 appears on the opposite page (35a). [The 1955 audit report, published while this case was pending in the Court of Appeals, showed at p. 20 excess collections to June 30, 1955 of $35,143,000].

The table opposite shows that the absorption of the business losses has been accomplished by charging to tolls the Company's entire interest, Canal Zone Government and administrative expense, contrary to law.

The effect of defendant's failure to comply with the law has been to deprive plaintiffs and their class of the benefit of the increased use of the Canal (Appx. A, 7). The corresponding increase at Suez has resulted in toll reductions there aggregating 40% since World War II.

THE COURT OF APPEALS AND THE GENERAL ACCOUNTING OFFICE HAVE CORRECTLY CONSTRUED THE ACT OF SEPTEMBER 26, 1950 AS REQUIRING THAT TOLLS BE BASED ON CANAL OPERATIONS, AND WITHOUT REGARD TO THE COLLATERAL ENTERPRISES.

The argument on this point will be extremely condensed.

Section 412(b) as enacted by Section 12 of the Act of 1950 (Appx. C, 31-32) provides that tolls shall be prescribed to cover the costs of "operating the Panama Canal, together with the facilities and appurtenances related thereto."

The context of the statute, the legislative history and other circumstances demonstrate decisively that the expression "facilities and appurtenances related thereto" does *not* include the collateral activities.

	Three years ended June 30, 1954		
	Canal activity	Business activities	Total
Revenue	$112,861,870	$141,958,379	$254,820,249
Operating expenses, including adjustments in 1954 to prior years' retained income	44,436,726	129,556,812	173,993,538
Operating income	68,425,144	12,401,567	80,826,711
General corporate expense (allocated by General Accounting Office):			
Net cost of Canal Zone Government (note a)	19,153,898	12,140,136	31,294,034
Interest payable to U. S. Treasury (note b)	18,518,673	5,439,180	23,957,853
Administrative and other general expenses (note c)	2,916,069	9,630,222	12,546,291
	40,588,640	27,209,538	67,798,178
Net income (—loss)	$ 27,836,504*	—$ 14,807,971	$ 13,028,533†

"(a) Net costs of Canal Zone Government are allocated on the revenue ratio defined in section 412(b) of the Canal Zone Code. This results in an allocation of 65 percent of these costs to the canal activity for 1954, 63 percent for 1953, and 55 percent for 1952. * * *

"(b) Interest for the fiscal years 1952, 1953, and 1954 is computed at 1.95, 2.05, and 2.342 percent, respectively, on $377,764,946, the net direct investment of the Government in the Company. * * *

About 78 percent of this is invested in facilities of the canal activity and the remaining 22 percent in facilities of all other activities. This relationship has been approximately the same for the past 3 years.

"(c) Most of the administrative and other general expenses were allocated on a direction-of-effort basis; the remainder was charged directly to the applicable activity. The direction-of-effort basis was used by the Company in 1953 for statistical purposes and seems reasonable. It results in an allocation of approximately 25 percent to the canal activity."

* The amount of $25,000 a day as the overcharge (p. 6) is reached by dividing $27,836,504 by 1,096, the number of days involved. The amount of $4,000 a day as the original plaintiffs' share of the excess is based upon the ratio of tolls paid by plaintiffs (10a) to aggregate tolls. Because of the use of the Canal by Government ships, the figure of $25,000 a day slightly overstates the daily overcharge paid by private shipping industry during the Korean war period, but because government use has decreased and private use increased, probably understates the present daily overcharge.

† In November, 1954 the Company paid "as dividends" $10,000,000 to the U. S. Treasury under Section 253, Title 2, Canal Zone Code (48ab).

Section 10 of the Act of 1950, enacting Section 256, Title 2, of the Code (Appx. C, 29-30) authorized the President to transfer to defendant:

> "* * * the Panama Canal, together with the facilities and appurtenances related thereto, *and* any or all of the facilities and appurtenances heretofore maintained and operated by the Panama Canal under authority of section 51 of title 2 of the Canal Zone Code."

Thus Section 10 drew a distinction between "the facilities and appurtenances *related*" to the Panama Canal, and "the facilities and appurtenances heretofore maintained and operated" under Section 51, etc.

A third category of defendant's activities were those already in its possession by virtue of the Act of 1948 by which it had been created.

When the President on June 29, 1951 issued his Executive Order No. 10263 (Appx. C, 34), he transferred to defendant:

> "(a) the Panama Canal (the waterway), together with all the facilities, buildings, structures, and improvements related thereto, *and* (b) ~~all other facilities, buildings, structures, and improvements related thereto, and (c)~~ all other facilities, buildings, structures and improvements whatsoever now maintained and operated by The Panama Canal. * * *"

Thus again the distinction was drawn between the facilities and appurtenances related to the Canal and other facilities, etc.

As indicated in the hearings and reports cited in the footnotes of the Court of Appeals opinion, the legislative history is categorical that defendant's respective activities were to be self-sufficient and that the general expenses were

to be allocated among them. For instance, the Bureau of the Budget study which led to the Act of 1950, said that:

> "Sales and services [of the collateral business activities] to all others, including Government agencies, should be at prices over cost which may reasonably be expected to cover, in the aggregate, the interest on the Government's investment and the Company's share of the expense of civil government and related activities * * *" (62a).

Again, the Bureau study maintained that the "expense of civil government would be assessed against the total enterprise, rather than exclusively against tolls * * *" (62a).

At the Senate hearing the Bureau representative explained that "any business has to carry its share of the interest, too, in proportion to its investment" (97a).

The Committee staff member at that hearing asserted that under the bill the "various businesses like commissaries, *et cetera* * * * will have to be self-sustaining and contribute their share toward the over-all operating costs of the Canal" (97a).

Both House and Senate Committee reports adopted the same theory (Appx. E, 39-41; 140a-143a), as did defendant's budget program for 1952, prepared at the time of the enactment of the Act of 1950. President's Budget for fiscal 1952, pp. 572-575.

In the interest of brevity we do not further develop this point herein.

DEFENDANT KNEW THAT IT WAS ITS DUTY TO PRESCRIBE TOLLS ON THE BASIS OF CANAL OPERATIONS AND NOT TO USE TOLLS TO ABSORB THE LOSSES OF ITS COLLATERAL ACTIVITIES, AND DEFENDANT WAS FREQUENTLY SO WARNED.

Although plaintiffs do not regard it as incumbent upon them to do more than show that defendant acted unreasonably and unlawfully under a proper construction of the statute, there is evidence that defendant was quite conscious of the true meaning of the law but wilfully chose to disobey it. Plaintiffs' efforts to develop this evidence by discovery procedures auxiliary to their motion for summary judgment were stayed by the District Judge pending his consideration of the defendant's motion to dismiss the complaint (163a-164a). The record and official publications do, however, show the following:

Its 1952 budget program, prepared at the time of the enactment of the 1950 legislation, defendant set up a separate budget for the Canal, and, finding tolls insufficient according to its estimates, stated its intention to increase tolls. The budgets for the collateral or "business activities" were also separate, and showed these activities bearing their share of general and administrative expense. President's Budget for fiscal 1952, pp. 572-575.

So as to be concise we shall not here trace in detail the extraordinary and "ambiguous bookkeeping" by which defendant in its subsequent budget programs and annual reports "concealed" the financial results (28a-33a); 1953 Budget, pp. 725-727; 1954 Budget, pp. 684-685; 1955 Budget, pp. 631-637; 1956 Budget, pp. 647-649.

According to GAO, in December, 1953 defendant's General Counsel found unlawful its policy of pricing the

goods and services of the "business activities", that is, the policy by which the business activities, by not carrying their share of general expense, charged their losses to tolls (48a). This opinion was withheld from the Board of Directors (48a), GAO implies.

Plaintiffs believe this opinion to be of special significance as it necessarily found preliminarily that the law required that the separate activities be self-sufficient. Defendant had waived its privilege, if any, with respect to this opinion. *Himmelfarb* v. *United States*, 175 F. 2d 924, 938-939 (C. A. 9th). Plaintiffs' efforts to get a copy were, however, stopped by the District Judge's stay. Plaintiffs are at a loss to conceive how defendant's President, an Army officer, could justifiably overrule its General Counsel, a career civil servant learned in Canal Zone law and the codifier of the Canal Zone Code.

Defendant's 1954 report referred to bills pending in Congress to amend Section 412 (b) "so as to redistribute the corporate burden internally in order to shift a relatively large portion of the burden on tolls activity, and correspondingly, to decrease the portion of overall obligations which is to be borne by other activities of the Company" (147a)—a remark which showed that defendant was aware how Section 412 then did, as it now does, distribute the "overall obligations" because, as noted, it is by charging its general expense against tolls that defendant has used tolls to absorb the losses of its other ventures.

In November 1954 defendant declared a dividend of $10,000,000 under Section 253, Title 2, Canal Zone Code (48a). Section 253 authorizes the payment of excess working capital as dividends, a measure applicable only to the profits of the collateral activities in view of the command of Section 412 that tolls be related to costs (48a).

On May 13, 1955 the GAO audit report for 1954 was published. This report has been referred to and quoted *supra* pp. 6-9.

DEFENDANT AVOIDS THE ISSUE IN THIS SUIT.

After this suit had been brought on September 13, 1955, plaintiffs moved for summary judgment on October 26, 1955 (11a). The moving affidavit of plaintiffs' counsel emphasized that the tolls formula was independent of the "business operations" (16a-18a; 25a-39a).

Nevertheless the affidavit of defendant's counsel, supporting its motion to dismiss, studiously avoided that issue, although discussing the subject of tolls at length (150a-161a). So did defendant's brief in the District Court.

The District Judge dismissed the complaint, but he "assumed for purposes of this motion that tolls prescribed pursuant to Section 412 would be lower than those now prevailing" (170a).

In the Court of Appeals defendant's brief again failed to argue that the statute authorized the use of tolls to absorb the losses of collateral activities, although in other respects freely discussing tolls policy.

The Court of Appeals announced its decision on April 8, 1957 (Appx. A, 1). That Court expressly held that the law did not permit defendant to take into account the losses of the business activities in prescribing tolls (Appx. A, 13-14).

Thereafter, on May 1, 1957, the Court of Appeals denied a stay (Appx. B, 26).

Then defendant applied to Mr. Justice Harlan for a stay. Defendant apparently sought to convey the impression that the major substantive question was a dispute

between defendant and GAO over accounting techniques.* However on the representation by the Assistant Attorney General that our country's foreign relations might be adversely affected, Mr. Justice Harlan granted a stay (Appx. B, 27).

The Jurisdiction of the Court of First Instance

The jurisdiction of the United States District Court for the Southern District of New York was invoked under the authority of Title 28, U. S. Code (Judicial Code), Section 1331, as follows:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

The complaint employs the phraseology suggested by Form 2(b) in the Appendix to the Rules of Civil Procedure for suits brought under the authority of this statute.

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* Thus the application asserted (p. 2): "In the annual commercial-type audit reports of petitioner for the years of 1954 and 1955, submitted by the Comptroller General to Congress pursuant to Sections 105 and 106 of the Government Corporation Control Act (59 Stat. 599, 31 U. S. C. 850, 851), the Comptroller General took the position that petitioner had allocated to the Panama Canal too high a share of the cost of the Canal Zone Government and an inadequate amount to the various supporting activities of the Canal, such as the Panama Railroad, dock, harbor and repair facilities, and commissary stores for employees and ships."

The fact is that the Comptroller-General had complained in 1954 that petitioner had made no allocations at all (1954 Report, 45a; cf. Appx. A, 28), and in 1955, that the petitioner had refused to make its allocations available to him (1955 Report, pp. 18-19). It was for this reason that the General Accounting Office made its own allocations as shown by the table quoted *supra*, p. 9.

ARGUMENT

Outline of Argument.

POINT I. As this case shows, failure to provide relief for the excessive tolls collected in the past rewards concealment and obstruction, frustrates the Congressional intent and gives an appearance of hypocrisy to professions by the United States that it favors the rule of law for international waterways.

POINT II. The review power of the President under Section 411 is supervisory and administrative in accordance with his constitutional duty to "take Care that the Laws be faithfully executed". The Court below erred, plaintiffs submit, in construing Section 411 as a delegation of legislative power authorizing the President to disregard the tolls policy embodied in Section 412.

POINT III. Construed to mean that the President may set tolls that do not comply with Section 412, the Section 411 proviso is unconstitutional and void.

POINT IV. Construing the Section 411 proviso to mean that the Section 412 formula must be complied with and not that it may be nullified, or disregarding the proviso as void, there is adequate basis for assessing damages: *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555.

POINT V. Congress showed its intent that defendant make reparation for overcharges by, (1) providing for the transfer of the Canal to defendant, a corporation fully subject to suit, (2) imposing upon defendant a duty to prescribe tolls according to a formula, (3) providing that that duty should be effective upon the transfer, and (4) imposing upon defendant the status of a public utility by incorporation of Article III, Section 1 of the Hay-

Pauncefote Treaty in the laws of the United States. These statutes create legal relationships under which well-settled principles accord a right to damages when the duty is breached, although a toll prescribed by defendant is not finally effective *per se;* specific provision for damages is unnecessary.

POINT VI. The theory that the President's review power under Section 411 was for better compliance with Section 412 and not for its nullification is in no way inconsistent with judicial relief.

POINT VII. The United States is not an indispensable party.

POINT I

As this case shows, failure to provide relief for the excessive tolls collected in the past rewards concealment and obstruction, frustrates the Congressional intent and gives an appearance of hypocrisy to professions by the United States that it favors the rule of law for international waterways.

Here the courts have adjudicated that defendant acted unlawfully in its obstinate refusal to fix tolls on the basis of Canal operations; moreover, defendant apparently realized that such was its legal duty and received frequent warnings from others to the same effect, *supra* pp. 12-14, and defendant long aided its unlawful refusal by concealment effected by "ambiguous bookkeeping" (Appx. A, 14).

Under these circumstances the Court of Appeals denied a stay pending petition for certiorari. That Court believed that "in view of the heavy accumulating loss to plaintiffs . . . a stay of the mandate to prevent even a beginning

in the lengthy steps necessary towards compliance with this court's order is not in the interest of justice" (Appx. B, 26).

On the other hand Mr. Justice Harlan thought "the particular interim interests of these steamship companies must yield to the broader concerns involved [i.e., our country's foreign relations] in having this litigation proceed to an orderly final conclusion" and granted the stay (Appx. B, 27).

Some six years have now passed since the new tolls policy became "effective" according to the Congressional declaration (Section 14, Act of September 26, 1950; Appx. C, 32). At least six months must pass after this Court's decision before a new rate can go into effect. At the stay hearing before Justice Harlan the Assistant Attorney General spoke of "contempt proceedings" after the entry of a decree for plaintiffs, indicating that still further litigation will be necessary to secure compliance.

If there is to be no liability for past damages, then through the delay seemingly inherent in this type of litigation and its long hidden, persistent disobedience, defendant is the gainer to the extent of tens of millions of dollars and the Congressional intent that the formula take effect July 1, 1951 is frustrated.

Defendant's counsel successfully argued foreign relations before Justice Harlan.

Our highest officials have in the last year urged forcefully and well that international waterways be governed by the rule of law and not by arbitrary executive power. Unfortunately foreign nations are not likely to give full weight to these fine pronouncements if our country permits an executive department of our own to retain vast sums judicially declared to have been unlawfully levied upon the commerce of the world for many years.

POINT II

The review power of the President under Section 411 is supervisory and administrative in accordance with his constitutional duty to "take Care that the Laws be faithfully executed". The Court below erred, plaintiffs submit, in construing Section 411 as a delegation of legislative power authorizing the President to disregard the tolls policy embodied in Section 412.

As shown *supra* pp. 3-4, the Court below ruled against the claim for damages on the theory that the review power of the President under Section 411 permitted him to disregard the tolls policy embodied in Section 412. Plaintiffs submit that this ruling was erroneous.

A. Prior legislation and the immediate background show that Congress intended by the Act of September 26, 1950 to establish tolls policy, not to abdicate it.

Congress has at all times regulated tolls policy, although permitting the executive branch a limited discretion within the framework of that policy. The successive statutes are the Act of August 24, 1912 (37 Stat. 560, 562-3), the Act of June 15, 1914 (38 Stat. 385-6), the Act of June 19, 1934 (48 Stat. 1122) and the Act of August 24, 1937 (50 Stat. 750); they are collected in Appendix D to this brief, *infra* pp. 35-38.

As pointed out by the Court of Appeals at footnote 13 (Appx. A, 9) President Franklin D. Roosevelt, having difficulty in the construction in of the statute, sought and obtained clarifying legislation—the Act of August 24, 1937.

And in 1913 President Wilson, disagreeing with the policy of the Act of 1912 in so far as applicable to intercoastal shipping, sought and obtained legislative amend-

ment—the Act of June 15, 1914. 4 Baker, *Woodrow Wilson*, pp. 421-2.

That Congress should abandon this historic control is not to be lightly presumed. The legislative history of the Act of 1950 shows the direct contrary—that Congress intended thereby to establish policy, not to abandon its control of policy.

The minutes of the hearing of the subcommittee of the Senate Committee on Armed Services and the report of that Committee are in the record (Hearing, 69a-139a; Report, 140a-143a). Almost the entire Armed Services report is devoted to an exposition of that formula, treating it as the major accomplishment of the legislation. At the hearing before the House Merchant Marine Committee substantially the same witnesses appeared and said the same things: excerpts from the report of that Committee are attached hereto as Appendix E. The minutes and report show primary attention to the tolls formula.

By way of contrast the President's review power, was, as put by the Court of Appeals, "hardly discussed during the legislative history of the Act" (Appx. A, 13). That power was not even mentioned in the Armed Services report. It is not conceivable that Congress could have intended in such offhand fashion to authorize the President, contrary to the tradition of Panama Canal tolls-fixing, to set aside the formula to the development of which Congress had devoted so much care.

B. In view of the President's character as the repository of the "executive power" (Article IV, Section 1) and his duty to "take Care that the Laws be faithfully executed" (Article IV, Section 3), the natural and suitable construction of the proviso is that the President should see to it that the Panama Canal toll rate complies with law.

To construe the proviso to delegate legislative power without the guidance of any standard is, plaintiffs submit, artificial and unreasonable.

The primary function of the President is administration and not legislation. As this Court said in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 587: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."

The administration of the Government is so gigantic and complex that the President obviously cannot be expected to oversee, much less to perform, every operation, as this Court said more than a century ago in *Williams* v. *United States*, 1 How. 290, 297.

The evident purpose of the Section 411 proviso was to make sure that the matter of setting Panama Canal tolls did receive the personal attention of the President.

To be practical, let us recall that the proviso was originally proposed by a report of the Bureau of the Budget (66a), a body that has come to audit and correlate the performance of their functions by the executive departments. The proviso meant that before the rate went into effect the Bureau of the Budget would have a look at it.

It is undoubtedly true that Congress has from time to time authorized the President and other public officers and bodies to make rules or findings legislative in nature. These authorizations were elaborately discussed by this Court in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. That discussion makes abundantly clear that such authorizations are, as Chief Justice Marshall expressed it in *Wayman* v. *Southard*, 10 Wheat. 1, 43, "to fill up the details" of policies and standards laid down by Congress. 293 U. S. 426. In

other words the authorization is for the better enforcement of Congressional policy, not for its nullification.

In the *Panama Refining* case the Court referred at length to *United States* v. *Grimaud*, 220 U. S. 506, a leading case that, like this, relates to Government property and the exercise of Congressional power under Article IV, Section 2, of the Constitution as well as under Article I. Relying on that case the Court emphasized that Congress might confer power, not to make laws, but "for administering the laws which did govern * * * valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined * * * (Congress) was merely conferring administrative functions upon an agent, and not delegating to him legislative power". 293 U. S. 428-429.

The principle that rate-making is a legislative process, *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, is not inconsistent with this analysis of the power of the President under Section 411. In the exercise of its rate-making power Congress customarily lays down "an intelligible principle to which the person or body authorized to fix such rates is directed to conform." *Hampton & Co.* v. *United States*, 276 U. S. 394, 409. The language used by this Court to describe the President's rate-making powers under the Act of October 1, 1890 was, in *Field* v. *Clark*, 143 U. S. 649, 693, "What the President was required to do was simply in execution of the Act of Congress"—language repeated in *Hampton* at pp. 410-411 and in *Panama Refining* at p. 430.

POINT III

Construed to mean that the President may set tolls that do not comply with Section 412, the Section 411 proviso is unconstitutional and void.

Article I, Section 1, of the Constitution entrusts to Congress "all legislative Powers". Article IV, Section 3 grants to Congress the power "to make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States".

In *Panama Refining Co.* v. *Ryan* this Court held unconstitutional Section 9 (c) of the National Industrial Recovery Act, 48 Stat. 195, 200, by which the President was authorized to prohibit the interstate transportation of oil produced in excess of state permission. The Court said at 293 U. S. 388, 430. "... the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."

In referring to the President's action as a "veto" and a "political decision", and in saying "there is no way of knowing whether or not the President would have approved tolls fixed by defendant" (Appx. A, 13. 18, 23) the Court of Appeals apparently construed the Section 411 proviso to be as unlimited a grant as that in Section 9(c) of NIRA. So construed the grant would be, like that of Section 9(c), unconstitutional and void.

Although it is true that *Panama Refining* dealt with "legislative Powers" under Article I, Section 1, the principle of that case is equally applicable to property powers under Article IV, Section 3 under which Congress was per-

haps acting in adopting Section 412. In *Panama Refining* this Court cited cases arising under these sections interchangeably.

POINT IV

Construing the Section 411 proviso to mean that the Section 412 formula must be complied with and not that it may be nullified, or disregarding the proviso as void, there is adequate basis for assessing damages. *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555.

The difficulty found by the Court in determining damages was that "there is no way of knowing whether or not the President would have approved" tolls fixed by defendant (Appx. A, 23). But when that approval is contrued to mean executive supervision of defendant's performance of its duty under Section 412, that difficulty disappears, or, at least is brought within permissible limits in the calculation of damages.

The toll rate necessary to pay the cost of Canal operation can be readily ascertained—in fact, has been ascertained by the General Accounting Office. Defendant's stay application intimated that it disputes some of GAO's determinations. What defendant disputes plaintiffs do not know because defendant has never made public its own statement of results by activities. Plaintiffs cannot conceive any issue in the calculation of damages which could not be solved by a Special Master in accordance with accepted legal principles.

If it be established that defendant has wronged plaintiffs, as the Court of Appeals has held, damages can be awarded on the basis of proof from which a reasonable inference can be drawn, despite the absence of proof permitting a precise computation.

The only impediment here is that the statute contemplated that tolls be fixed prospectively, while a court would determine damages retrospectively. Although this impediment is perhaps a difficulty in calculating what figure would have been reached if defendant had complied with Section 412, it will in fact permit a more accurate effectuation of the Congressional tolls policy.

Certainly the situation is well within the rule laid down by this Court in *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 563:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

This rule has been followed in cases requiring far more speculation than is necessary here. *Cf. Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251.

It is to be observed that any difficulty in determining damages here is that always encountered in suits against public utilities for excess charges. A public utility has the right to exercise its own judgment as to what is lawful and reasonable and prospectively fix a rate accordingly. Once it is ascertained that the utility has not so

acted, then the court, acting retrospectively, will fix a lawful and reasonable rate and give judgment for the excess. Cf. cases cited *infra*, pp. 28-30.

POINT V

Congress showed its intent that defendant make reparation for overcharges by, (1) providing for the transfer of the Canal to defendant, a corporation fully subject to suit, (2) imposing upon defendant a duty to prescribe tolls according to a formula, (3) providing that that duty should be effective upon the transfer, and (4) imposing upon defendant the status of a public utility by incorporation of Article III, Section 1 of the Hay-Pauncefote Treaty in the laws of the United States. These statutes create legal relationships under which well-settled principles accord a right to damages when the duty is breached, although a toll prescribed by defendant is not finally effective *per se*; specific provision for damages is unnecessary.

The Court below dismissed the claim for damages upon the further ground that "we find no evidence of a congressional intent to allow recovery of overcharges" (Appx. A, 23). Plaintiffs submit that Congress by creating between shipowners and defendant legal relationships under which well-settled principles accord a right of damages when duty is breached showed an intent to allow such recovery.

That public corporations subject to suit have all the liabilities of private corporations, except as to execution, has been settled by numerous decisions of this Court. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381; *F. H. A.* v. *Burr*, 309 U. S. 242; *R. F. C.* v. *Menihan Corp.*, 312 U. S. 81.

With respect to defendant, we know not only that Congress presumably had in mind the general principles applicable to public corporations as laid down by this Court, but also that the 81st Congress, which enacted the Act of September 26, 1950, specifically intended that defendant "should be subject to suit on *all* claims, tort as well as contract, in the *same* manner as *any* private corporation". The quotation is from the House Judiciary Report on Public Law 172, 81st Congress 1st Sess. (House Report No. 830, U. S. Code Cong. Serv. p. 1591). Public Law 172, approved July 16, 1949, took defendant out of the Federal Tort Claims Act for the purpose stated. A repercussion of Public Law 172 was before this Court in *Gardner* v. *Panama R. Co.*, 342 U. S. 29.

About a year later the 81st Congress enacted the Act of September 26, 1950. By that Act Congress authorized the transfer of the Canal to defendant, an "agency" of the United States which was subject to suit like "any private corporation," imposed upon defendant the duty to prescribe tolls according to a formula and made that duty "effective" upon the transfer, an event that occurred July 1, 1951 (16 F. R. 6333). (Sections 10, 11, 12 and 14 of the Act, Appx. C, 29-32).

Further, Congress by Section 12 of that Act enacting Section 412(d), incorporated in the laws of the United States the tolls provision of the Hay-Pauncefote Treaty, Article III, Section 1, 33 Stat. 1903, as follows:

> "The United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October 1888, for the free navigation of the Suez Canal, that is to say:
>
> "1. The Canal shall be free and open to the vessels of commerce and of war of all nations observ-

> ing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable" ["just and equitable charges" is taken from the French legal expression, "*justes et equitables charges*," meaning "reasonable rates"].

The obligation to serve all customers without discrimination and at reasonable rates is the classic characteristic of the public utility in Anglo-American law. *Munn* v. *Illinois*, 94 U. S. 113.

By these provisions Congress showed its intention that this country's duty under the Hay-Pauncefote Treaty in respect of tolls, whatever it might continue to be as a matter of international negotiation or litigation, was now enforceable as a matter of municipal law in the courts of the United States, and defined reasonable rates as the Section 412 formula.

And as a matter of municipal law that duty is enforceable, under well-settled principles of law, not only with respect to future rates, as held by the Court of Appeals, but also as to past damages, irrespective of express statutory provision.

Defendant's liability as a corporation with public utility obligations: When a public utility fails to perform its duty to fix a lawful and reasonable rate, the user may recover in the courts whatever excess has been charged. *Arizona Grocery Co.* v. *Atchison Ry. Co.*, 284 U. S. 370, 383; *Salt River Canal Co.* v. *Nielsen*, 10 Ariz. 9; *City of Chicago* v. *Northwestern Co.*, 218 Ill. 40 (municipal water system); *Winchester Turnpike Co.* v. *Croxton*, 98 Ky. 739; *Heiserman* v. *Burlington, C. R. & U. Co.*, 63 Iowa, 732;

Louisville etc. Ry. Co. v. *Wilson*, 132 Ind. 517, 526. The language of this Court in the *Arizona Grocery* case was as follows at 284 U. S. 383:

> "The exaction of unreasonable rates by a public carrier was forbidden by the common law. [Citation.] The public policy which underlay this rule could, however, be vindicated only in an action brought by him who paid the excessive charge, to recover damages thus sustained. Rates, fares, and charges were fixed by the carrier, which took its chances that in an action by the shipper these might be adjudged unreasonable and reparation be awarded."

And when, as in the *Winchester* and *Heiserman* cases, *supra*, the legislature defines what is reasonable, the user may recover any excess charged over the rate thus defined.

This principle continues to the present day despite the creation of regulatory commissions with authority to make reparations findings. Thus, under Section 16(2) of the Interstate Commerce Act, the Commission's reparation order merely is a condition precedent to, and evidence in, the user's suit for damages for the excess over the lawful rate. *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 430; *Lewis Co.* v. *Southern Pacific R. Co.*, 283 U. S. 654, 660-661. Only the courts definitively adjudge relief.

Defendant tries to hide behind the President—a somewhat presumptuous argument as defendant, acting unlawfully, deprived the President of an opportunity to function. In any event the argument does not have force. When the tariff rate is excessive, the failure of the carrier to file with the Interstate Commerce Commission a new and lawful rate calls for damages, although the Commission has a power to disapprove a rate so filed [Section 15(7)], and

although "as between shipper and carrier [the tariff rate] is the only legal rate." *L. & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 234; cf. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, 187; *Lewis Co.* v. *Southern Pacific Co.*, *supra*.

Defendant's liability as a public officer or body: the citizen may recover damages suffered by reason of the failure of a public officer or body to perform its statutory duty. *Amy* v. *Supervisors*, 11 Wall. 136. Most cases applying this doctrine relate to public officers who have full control of the administrative process in question. At least one case, however, relates to a public officer who did not have final power, but, like the defendant here, had the duty of initial action, final action to be taken by another agency. *Hupe* v. *Sommer*, 88 Kan. 561, was a suit by a contractor against a city official who had wrongfully refused to certify to the county clerk that work under the contract had been satisfactorily completed. Under the statute the county clerk, upon receiving a certificate of completion, took final action in respect of payment. The Court said at pp. 564-565:

> "The petition also alleges that the defendant failed and refused to proceed as the law provides for the collection of the money and the payment of the plaintiff, and *failed and refused to put into operation the machinery provided by law* for the collection of taxes and moneys . . . If the defendant, without sufficient excuse, refused to perform [his duties], *he inflicted a wrong upon the plaintiff, and should be liable for whatever loss was thereby occasioned.*"

More particularly, a citizen entitled to mandatory relief against a public officer also receives damages caused by the delay in the performance of that duty. *Dow* v. *Humbert*,

91 U. S. 294, specifically approving *People* v. *Supervisors*, 28 N. Y. 112.

This Court has recognized that express provision for damages is not necessary.

The principle of the public utility rate and administrative law cases that breach of duty gives rise to an action for damages despite the absence of express statutory provision for damages has been recognized by this Court in similar cases.

In *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, the Court considered a suit for damages suffered in an accident caused by defendant's failure to comply with the Safety Appliance Act. The Court said at p. 39:

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the *damages* from the party in default is implied . . ."

In *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, the Court considered a suit by several Negroes against a collective bargaining agent to forbid discrimination against them in the agent's negotiations with the employer. The agent had been chosen and functioned under the Railway Labor Act. The Court construed the Act to require the agent to act without discrimination. The Court then addressed itself to the contention that the Act made no provision for judicial relief, and said at p. 207:

> "That right (that the agent act without discrimination) would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty

> to give in cases in which they have jurisdiction. . . . We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of *injunction and award of damages* when appropriate for breach of that duty."

The Court below relied on *Montana-Dakota Co.* v. *Public Service Co.*, 341 U. S. 246, a five-to-four decision of this Court. But in that case the plaintiff had brought suit under the Federal Power Act, a statute which granted a third party regulatory agency, the Federal Power Commission, the power to prescribe future rates, but consciously and deliberately withheld the power to grant reparations. A majority of the Court concluded that under these circumstances a complaint alleging excess rates in the past did not state a cause of action under the Federal Power Act. (It is to be noted, however, that even the Federal Power Act permitted damages back to the institution of rate proceedings.) The complaint also alleged that the rates were fraudulent, but the Court found no federal jurisdiction over that aspect of plaintiff's grievance. But here the case concerns a tort committed by the defendant of which the District Court, as a federal court, unquestionably had jurisdiction., 28 U. S. C. §1331, *supra* p. 15.

POINT VI

The theory that the President's review power under Section 411 was for better compliance with Section 412 and not for its nullification is in no way inconsistent with judicial relief.

As this is a subject on which the parties seem to agree, the argument can be cut short.

At page 30 of its brief in the Court of Appeals defendant said:

"The President's approval thus constitutes 'final agency action' (cf. Shaughnessy *v.* Pedreiro, 349 U. S. 48, 51)".

In *Shaughnessy* v. *Pedreiro* this Court held that the word "final" with reference to the action of an executive officer meant, in statutes enacted after the Administrative Procedure Act, final within the administrative procedure; rights of judicial review were not impaired. 349 U. S. 51.

There can be no doubt that this doctrine applies to the Act of September 26, 1950. No more need be said.

POINT VII

The United States is not an indispensable party.

The principal argument made by the defendant in the District Court was that plaintiffs had failed to join an indispensable party, *viz.*, the United States, and that the suit should be dismissed because it was an unconsented suit against the United States. But the United States, by creating the defendant corporation, accepting the role of stockholder in it, and by providing that defendant may be "sued

in its corporate name," gave its consent to be sued in so far as it had an interest in defendant's affairs.

Two decisions of the Court of Appeals of the Fifth Circuit held that defendant's predecessor, Panama Railroad Company (the New York Company), was subject to suit despite the fact that the Government was its sole stockholder and, at that time, had not expressly consented that it be sued. *Panama R. Co.* v. *Curran*, 256 Fed. 768, and *Panama R. Co.* v. *Minnix*, 282 Fed. 47.

The Court said in the *Curran* case, at p. 772:

> " . . . such legislation as that which has been mentioned shows that the lawmakers intended the relation between the government and the defendant to be that of a stockholder to the corporation which issued the stock, and not that of principal and agent. This being true, the following statements made in the opinion of Chief Justice Marshall in the case of Bank of the United States *v.* Planters' Bank, 9 Wheat. 904, 6 L. Ed. 244, are applicable to the facts of the instant case:
>
> "'. . . The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character.'"

As we have seen *supra*, p. 27, Congress, shortly before adopting the Act of September 26, 1950, took the defendant out of the Federal Tort Claims Act so as to restore to it its former status as "subject to suit on all claims, tort as well as contract, in the same manner as any private corporation."

WHEREFORE, petitioners respectfully pray that a writ of certiorari issue under the seal of this Court to review the judgment and decree herein of the United States Court

of Appeals for the Second Circuit in so far as said judgment and decree dismiss petitioners' claim for damages for excess tolls collected in the past, and that said judgment and decree to that extent be reversed.

July 2, 1957

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 111—October Term, 1956.

(Argued November 13, 14, 1956. Decided April 8, 1957.)

Docket No. 24226.

GRACE LINE, INC., *et al.*,
Plaintiffs-Appellants,

and

NATIONAL BULK CARRIERS, INC., *et al.*,
Intervening Plaintiffs-Appellants,

v.

PANAMA CANAL COMPANY,
Defendant-Appellee.

Before:

CLARK, Chief Judge, and
FRANK[1] and HINCKS, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Lawrence E. Walsh, Judge.

Grace Line, Inc., and eleven other United States flag shipping lines, suing on behalf of all users of the Panama Canal, together with certain intervening plaintiffs, appeal

[1] Judge Frank heard arguments in this case, but died before this opinion was prepared.

from a dismissal, D. C. S. D. N. Y., 143 F. Supp. 539, for want of jurisdiction, of their complaint seeking to compel Panama Canal Company to prescribe tolls as required by recent congressional legislation and to recover damages for its past failure to do so. Reversed and remanded for a judgment for plaintiffs as stated.

C. Dickerman Williams, of Maclay, Morgan & Williams, New York City (J. Stewart Harrison, of Brobeck, Phleger & Harrison, San Francisco, Cal., and William J. Stoddard, of Maclay, Morgan & Williams, New York City, on the brief), for plaintiffs-appellants and intervening plaintiffs-appellants.

George Cochrane Doub, Asst. Atty. Gen., Washington, D. C. (Leavenworth Colby, Chief, Admiralty & Shipping Section, Dept. of Justice, Washington, D. C., Paul A. Sweeney and Herman Marcuse, Attys., Dept. of Justice, Washington, D. C., and Benjamin H. Berman, Atty. in Charge, Admiralty & Shipping Section, Dept. of Justice, New York City, on the brief), for Panama Canal Company, defendant-appellee.

Brief by James M. Estabrook, New York City, as *amicus curiae* in support of plaintiffs-appellants.

Clark, Chief Judge:

This appeal concerns the power of a federal district court to compel the government corporation which operates the Panama Canal to set tolls according to the new formula

established by Congress in 1950 and to repay canal users several million dollars damages for excess tolls charged. It raises interesting and important questions as to judicial responsibility and authority when administrative action is dilatory or lacking.

A class action by canal users seeking this relief ended in summary judgment for the defendant below, when Judge Walsh concluded that he lacked jurisdiction over the subject matter and over an indispensable party. In brief, he interpreted the 1950 statute[2] as giving the defendant discretion to defer use of the new formula and denying judicial review of the defendant's decision. The history of toll regulation in the canal illuminates the conflicting interpretations of the most recent statute.

From 1912 to 1948 two different government bureaus operated commercial enterprises in the Canal Zone. Under 1902 legislation the President owned all the stock of Panama Railroad Company, a corporate ancestor of the present defendant which ran a railroad, a shipping line, and miscellaneous ventures. After 1912 there also existed The Panama Canal, an unincorporated agency headed by a governor whom the President appointed. This agency administered the civil government of the Canal Zone and operated the canal itself.

The President had statutory authority to fix canal tolls at his discretion between 75 cents and a dollar per laden ton, and a formula was worked out by the President, the Treasury Department, and the governor whereby tolls would be set high enough to cover operating expenses of the canal, "interest," and the cost of civil government in the Canal Zone. Canal users protested that the cost formula was unfair to them, and in later years tolls were set much

[2] Act of Sept. 26, 1950, 64 Stat. 1038, amending Title 2, §§411, 412, of the Canal Zone Code, approved June 19, 1934, 48 Stat. 1122. The Canal Zone Code does not constitute a part of the United States Code.

lower than the formula would have required. As expenses rose, the toll rate required by the formula became greater than the statutory maximum of $1.00, while the toll remained constant at 90 cents a laden ton.

Meanwhile Panama Railroad Company, which bore very little of the burden of government in the Canal Zone, continued its highly profitable operations, returning a surplus to the Treasury. The corporation made no financial reports to Congress and was not supervised by the Bureau of the Budget or the General Accounting Office. In 1948 to obtain greater financial supervision Congress reorganized the defendant's predecessor under federal law as a government corporation,[3] subjecting it to the requirements of the Government Corporation Control Act of 1945.[4] Henceforth it was required to keep books in the fashion of a commercial business for annual submission to Congress after Presidential revision, and it was to be audited periodically by the General Accounting Office, which, in turn, reported to Congress.

The same year President Truman announced a rise in canal tolls to $1.00 per laden ton to meet continuing deficits from The Panama Canal. When the shipping industry responded with severe protests the increase was deferred pending study by congressional committees and the Bureau of the Budget. A three-cornered struggle developed. The railroads wanted to prevent what they considered a subsidy to shipping—operation of the canal below "cost." The Bureau of the Budget wanted increased revenue from the canal operation and better bookkeeping procedures. The shipping lines wanted revision of the formula for determining "costs" of the canal to enable the canal to be "self-sustaining" without greatly raising tolls.

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[3] Act of June 29, 1948, 62 Stat. 1075.

[4] 59 Stat. 597, 31 U. S. C. §§841-871.

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The resulting compromise is the statute now before us. Ownership of the physical properties of the canal was transferred from the governor's agency to the defendant corporation, now rechristened Panama Canal Company, which was to be operated by its board of directors like a commercial business, dealing with other government agencies on a business footing and meeting its expenditure from its own income. The cost of civil government in the Canal Zone was to be borne by the defendant, in lieu of taxes; and this cost was to be apportioned among the various business enterprises equitably, thus relieving the former heavy burden on the canal operation. As part of the new scheme, toll-making authority was transferred from the President to the defendant, and the statutory maxima and minima were removed. Tolls were to be set to cover costs, which were defined by statute for the first time; and the new cost formula was made more favorable to canal users than the previous informal arrangement of the President, the Treasury Department, and the governor.[5]

Both Congress and the President retained some control over toll-fixing. The annual budget reports to Congress and the periodic GAO audits required under the Government Corporation Control Act would henceforth cover the operation of the canal, now that it, too, was run by the defendant. The President retained the power to appoint the members of the defendant's board of directors, and no change in tolls could be made without his approval.

For three years after passage of the Act the defendant submitted its annual budgets to Congress, reporting a profit from its combined operations, but not allocating the cost of interest or civil government among its various enter-

[5] The major changes were that interest during construction was no longer included in capital investment; costs of civil government were no longer borne almost exclusively by the canal users; interest was reduced to commercial rates; and military vessels were to pay for their transits. A proposal t allocate half the cost of the canal to national defense was rejected.

prises.[6] No objections were taken to these budgets by Congress and no steps were taken by the defendant to change toll rates. The present controversy began in 1955 when the General Accounting Office completed its audit of the defendant and reported:

> "* * * The Company, as a whole, has been self-sustaining. However, the Company did not have available for our examination an analysis to determine the financial results by activities. We have prepared such an analysis by allocating general corporate expenses (interest, net cost of Canal Zone Government and administrative and other general expenses) to the activity operating results reported by the Company. * * *
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> "The analysis of the Company, reported net income of $13,000,000 for 3 years since the reorganization shows that, contrary to the apparent expectation of the Congress, the canal activity had a net income of $28,000,000 and business activities had losses of $15,000,000. * * *
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> "* * * Thus the net income from the canal activity is being used to offset losses from business activities.
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> "* * * We interpret the legislation as precluding any losses sustained by the Panama Canal Company in the operation and maintenance of business facilities being included in the basis for determining tolls under section 412(b). Based on the financial results of the canal activity for the past 3 years, toll rates would have to be reduced substantially if hearings were held at this time."[7]

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[6] Defendant's annual reports for the fiscal years ending June 30, 1952, 1953, and 1954, were attached as exhibits to an affidavit submitted by the plaintiffs. Criticism of the defendant's reports is detailed in the Comptroller General's Audit Report to the Congress of the United States on Panama Canal Company and Canal Zone Government for the Fiscal Year Ended June 30, 1955, 29-30 (hereafter cited as 1955 Audit).

[7] Report on Audit of Panama Canal Zone Government for the Fiscal Year Ended June 30, 1954, 2-3.

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The GAO attributed the loss from other business activities to inefficient management, reapportionment of the burden of civil government, and a diminished market for the goods and services of these enterprises.[8] The unexpected profit of the canal operation probably stems from the steady increase in foreign commercial volume since 1947.[9] The General Accounting Office did not believe that existing legislation authorized the defendant to continue recovering business activity losses through canal tolls and unsuccessfully sought amendment of §412(b) of the 1950 Act to accomplish that end.[10]

Judge Walsh rejected the General Accounting Office's construction of the 1950 amendments, which the plaintiffs support, and approved that of defendant Panama Canal Company. We turn first to this question of statutory interpretation.

I. Meaning of the 1950 Statute

A. Statutory Text. The old and new versions of §§411 and 412 are printed in the margin for comparison, since the first phase of argument concerns the significance of the changes in wording adopted in 1951.[11] The defendant views

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[8] 1955 Audit, 34-36.

[9] In the four years after the transfer of the canal to the defendant, foreign toll revenues rose from $16,935,823 to $23,442,170 per year, while American tolls went from $9,986,708 to $10,407,307. 1955 Audit, 3.

Congress had recognized that future tolls would depend on the volume of traffic, *e.g.*, Sen. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950), but had not anticipated a rise in volume of such proportions. Shipping line representatives had testified that American commercial volume was declining, while government spokesmen pointed out that the total volume of commercial shipping had gone up sharply in the past year. Hearings before the Subcommittee on Maintenance and Operation of the Panama Canal of the Senate Committee on Armed Services, 81st Cong., 2d Sess. 16, 20, 39 (1950).

[10] 1955 Audit, 1-4, 19.

[11] "Chapter 23.—Tolls for Use of Canal.

"411. Authority [of President] to Prescribe [and Change] Measurement Rules and Tolls.—The [President] *Panama Canal*

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§411 as controlling and finds great significance in the use of the verb "authorizes," which it contrasts with the man-

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Company is authorized [subject to the provisions of the section next following] to prescribe and from time to time change *(1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following,* the tolls that shall be levied [by the Government of the United States] for the use of the Panama Canal [, but no tolls when prescribed as above shall be changed unless six months' notice is given by the President by proclamation.] : *Provided, however, That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: Provided further, That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: And provided further, That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive.*

"412. BASES OF TOLLS [; MAXIMUM AND MINIMUM RATES].—*(a)* Tolls on merchant vessels, army and navy transports, colliers, *tankers,* hospital ships, supply ships, and yachts shall be based on net vessel tons of one hundred cubic feet each of actual earning capacity determined in accordance with the [Rules]. *rules* for the [Measurement] *measurement* of [Vessels] *vessels* for the Panama Canal, [prescribed by the President and as may be modified by him from time to time by proclamation,] and tolls on other floating craft shall be based on displacement tonnage. [Provided, That the basic rules of measurement shall not be changed except after public hearing and six months' public notice of such change. The rate of tolls on laden vessels shall not exceed $1, nor be less than $0.75 per net vessel ton as determined under the aforesaid rules, and] *The rate of tolls* on vessels in ballast without passengers or cargo [the rate] may be less than the rate of tolls for vessels with passengers or cargo. [In addition to the tolls based on measurement or displacement tonnage, tolls may be levied on passengers at rates not to exceed $1.50 for each passenger.]

"(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

"(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States

datory word "shall," found in other parts of the statute.[12] The plaintiffs reply that §411 merely identifies the person delegated with toll-fixing power and prescribes the procedure, while the obligation to set tolls according to formula flows from §412, where the mandatory language is found.

Defendant next points to the retention in §411 of the words "prescribe and from time to time change" which were also used in the earlier version of the statute conferring discretionary power on the President. From this we are asked to infer that similar discretionary power is to be exercised by the new authority. Plaintiffs reply that the old scheme was only discretionary within statutory limits and that on occasion the President sought congressional approval even for changes within these limits.[13] They also cite the first section of Article III of the Hay-Pauncefote Treaty of November 18, 1901, restricting Presidential dis-

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be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 240 of this title, as amended.

"*(d)* The levy of tolls is subject to the provisions of section 1 of article *III of the treaty between the United States of America and Great Britain concluded on November 18, 1901, of articles XVIII and* XIX of the convention between the United States of America and the Republic of Panama [entered into] *concluded on* November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Colombia proclaimed on March 30, 1922.

"*(e) Capital investment for interest purposes shall not include any interest during construction.*"

[12] And see, *e.g.*, *U. S. ex rel. McLennan* v. *Wilbur*, 283 U. S. 414, 418, 420; *U. S. ex rel. Simons* v. *Hines*, D. C. Cir., 69 F. 2d 229. But see *Supervisors* v. *United States*, 71 U. S. 435, 4 Wall. 435, 445-447; *United States Sugar Equalization Board* v. *P. De Ronde & Co.*, 3 Cir., 7 F. 2d 981, 985-986, certiorari dismissed 273 U. S. 691.

[13] In 1937 confusion over the statutory definition of tonnage led President Roosevelt to appoint a committee, which recommended revision of §412 to provide for measurement rules. Sen. Doc. No. 23, 75th Cong., 1st Sess. On August 24, 1937, the committee's recommendation was enacted by Congress, 50 Stat. 750, and the President revised tolls accordingly three days later. Presidential Proclamation No. 2248, 2 Fed. Reg. 1765-1774.

cretion by the requirement that all tolls be "just and equitable."[14]

The transposition of the phrase "subject to the provisions of the section next following" to modify the word "change," instead of the word "authorized," indicates to the defendant that the mandatory provisions of §412 were applicable only when and if changes in tolls were attempted. Plaintiffs however contend that the transposition, if at all significant, meant only that toll-making was subject to §412, while the rules for measuring vessels were not. The plaintiffs also say that another part of the statute making the legislation effective as of the time when the President transferred the canal to the corporation[15] answers the defendant's claim that §§411 and 412 fail to specify when the formula should go into effect, thus indicating discretion to delay utilizing the new scheme.

Finally, the defendant draws us to the proviso in §411 that "the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section." But this may have been intended to continue the legal authority of the old tolls fixed by the President during the interregnum when the President was no longer authorized to promulgate tolls and his corporate successor had not yet promulgated any, and would not be inconsistent with plaintiffs' position.

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[14] "The United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

"'1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.'" 32 Stat. 1903. The treaty is incorporated by reference into §412(d), Tit. 2, of the Canal Zone Code.

[15] Act of Sept. 26, 1950, §14, 64 Stat. 1043. The transfer occurred July 1, 1951. Exec. Order No. 10263, 16 Fed. Reg. 6333.

Summing up, the defendant would read the two sections as governing any future effort to change tolls, but leaving it entirely up to the defendant when and if any changes should be attempted. The plaintiffs just as cogently glean from the language a requirement that once the properties of the canal are given to the defendant the new formula must be applied with reasonable speed. Both interpretations are reasonable from the naked words, and we must seek further for their meaning.

B. Legislative History. During the three-year legislative progress of the statute there was no discussion of the possibility that the new law would work out to mean a drop in toll rates which the defendant might be reluctant to announce. The universal assumption of legislators and lobbyists was that the new § 412 would authorize an increase in some amount,[16] which the defendant would announce as soon as the necessary computations were completed.[17] The shipping industry, for example, lobbied to place a $1.00 maximum on tolls, holding the rise to 10 cents a laden ton.[18] The old informal formula of the President, the Treasury Department and the governor had long indicated that an increase was in order;[19] and

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[16] Hearings, *supra* note 9, at 8, 15, 28; Hearings before the Subcommittee on the Panama Canal of the House Committee on Merchant Marine and Fisheries, 81st Cong., 2d Sess. 68, 141 (1950); Sen. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950); 96 Cong. Rec. 13375, 14672 (1950).

[17] The Bureau of the Budget, which presented the bill which became law, expected the computations to take one year. A Report and Recommendations of the Bureau of the Budget, H. R. Doc. No. 460, 81st Cong., 2d Sess. 16 (1950) (hereafter, Bureau of the Budget Report); Hearings, *supra* note 16, at 48.

[18] *E.g.*, Hearings, *supra* note 16, at 76-82; Hearings, *supra* note 9, at 11-17. The proposal passed the House, but was rejected by the Senate Committee. Sen. Rep. No. 2531, 81st Cong., 2d Sess. 4 (1950).

[19] The last time the old formula indicated the propriety of reducing tolls was in 1931, and the following year, the formula was revised to remove the national defense write-off of some canal costs. Hearings, *supra* note 9, at 30. At the time the 1950 statute was passed, application of the old formula would have meant an increase of from 45 to 50 cents per ton. Hearings, *supra* note 9, at 7, 17, 24.

since 1948 the President had been impatient to proclaim the maximum statutory toll.[20] The major concern was that the defendant might be required by rising costs to raise tolls to the point where the intercoastal shipping industry could no longer compete with the railroads,[21] and the statutory proviso that toll increases be approved by the President was designed to safeguard the ship lines in that eventuality.[22]

The scope of the defendant's discretion must therefore be inferred from the general scheme of regulation which Congress created. The major change was the transfer of toll-making authority from the President to a government corporation organized on commercial lines. This was coupled with abandonment of the old statutory maxima and minima in favor of a single requirement that tolls cover costs. The latter were carefully delineated by Congress for the first time. These changes together spell an intention to change toll-making from a political decision made by the President to an economic decision made by the defendant corporation.[23]

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[20] On March 26, 1948, President Truman proclaimed a toll rise effective in six months. Presidential Proclamation No. 2775, 3 CFR 30 (1948 Supp.). The effective date was postponed to March 1, 1949, September 1, 1949, March 1, 1950, and finally March 1, 1951, while Congress considered the present statute; and upon passage of the present law the original announcement of an increase was revoked. Presidential Proclamation No. 2903, 3 CFR 56 (1950 Supp.), revoking Proclamations 2775, 2808, 2831, 2852 and 2875.

[21] Hearings, *supra* note 9, at 11, 14-16, 27, 36, 39; Hearings, *supra* note 16, at 67-69, 82-83, 102-125, 133-134, 142-152.

[22] Hearings, *supra* note 9, at 7; Bureau of the Budget Report at 17.

[23] *E.g.*, "If there is agreement as to the formula for establishing the toll rates and adequate business-type accounts and financial reporting, there is no sound reason for not delegating the rate-making function to the Company's Board of Directors, as has been done in the case of other Government corporations, such as TVA, which set the rates to be charged for their services." Statement of Harold Seidman, Accompanied by Russell Roane, Representing the Bureau of the Budget, Hearings, *supra* note 9, at 7, and Hearings, *supra* note 16, at 46. See also Bureau of the Budget Report at 16.

Throughout the hearings and debate it was assumed that, under the new law, tolls would be set by the defendant to make the canal self-sustaining, and there was virtually no mention of the President's veto power. Hearings, *supra* note 9, at 9, 11, 18, 27, 36; Hearings, *supra* note 16, at 54, 66, 68, 133, 139; 96 Cong. Rec. 13371-13380, 14671-14672.

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A certain latitude was allowed the defendant in deciding how frequently to change tolls, but this was limited by the requirement that in the long run tolls must reflect costs.[24] Congress was expected to review these short-range decisions with the aid of the defendant's annual budgets, but neither Congress nor the defendant was authorized to ignore the statutory formula indefinitely for reasons of policy or convenience.[25]

This last power was given the President, apparently to protect the American shipping industry.[26] Exercise of the Presidential veto was hardly discussed during the legislative history of the Act, and the apparent assumption of all concerned was that as a general rule the defendant's rate changes would become law. It was clear to Congress that the Hay-Pauncefote Treaty forbade discrimination against foreign vessels, so that any Presidential veto of rate increases would have to subsidize not only American lines, but the foreign lines, which comprised more than half the canal's commercial volume.[27]

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[24] "The present basis of establishing tolls rates does not lend itself to the ready adjustment of rates, either up or down, to reflect increases or decreases in costs or changes in commercial conditions. * * * It is significant that the tolls rates have not been changed under this formula since 1938.

"* * *

"While the tolls rate should not be changed on a year-to-year basis since 1 year's experience is insufficient to reflect accurately long-range trends, the rate should be adjusted periodically as changes take place in the factors that determine the charges that should be made for the use of the Canal. As the 1937 special committee expressed it:

"'Economic and commercial conditions are not static. The Panama Canal is a facility for the service of interoceanic commerce. The charges for the service should receive such adjustments from time to time as will keep the charges in harmony with the needs of the Canal and the requirements that must be met in making the Canal the servant and assistant of international intercourse.'" Bureau of the Budget Report at 16.

Congress recognized the possibility that in the long run the new formula might require reduction of tolls. Bureau of the Budget Report at 16; Hearings, *supra* note 9, at 18, 36; Hearings, *supra* note 16, at 139; Sen. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950).

[25] Hearings, *supra* note 16, at 49-50.

[26] Notes 21, 22 *supra*.

[27] Hearings, *supra* note 9, at 13, 23; Hearings, *supra* note 16, at 67, 146-147, 96 Cong. Rec. 13373-13379.

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That the defendant would defer toll changes in order to apply canal profits to cover its losses in other enterprises never occurred to the legislators. Although the cost formulae of the other ventures were not spelled out in the statute, each enterprise was expected to be self sustaining[28] and the annual commercial-style budget of the defendant corporation was expected to facilitate congressional scrutiny of the various operations. Until the GAO audit the defendant's ambiguous bookkeeping concealed the fact that the Treasury was being deprived of profits made in operating the canal, so that consumers of goods and services furnished by the other ventures could enjoy them below cost—the very type of subsidy the Government Corporation Control Act and the 1950 amendments to the Panama Canal Act were designed to prevent. The men who spent three years hammering out a compromise toll formula for future operation of the canal did not mean to give the defendant's board of directors carte blanche to ignore the statutory mandate whenever the defendant's other business ventures were losing money.

We conclude that Panama Canal Company was expected to propose changes in tolls for Presidential approval whenever it became apparent that tolls were substantially out of line with costs. While it was given discretion to defer proposals of change for short periods of time where it believed the discrepancy between costs and revenue was due to a temporary factor, it could not delay such proposals unreasonably long.

II. Defendant's Asserted Discretion to Delay

Defendant contends that, even if it was required to propose changes with reasonable frequency, it has been justi-

[28] Bureau of the Budget Report at 14; Hearings, *supra* note 9, at 8, 18-19, 22; Hearings, *supra* note 16, at 66-67, 74; Sen. Rep. No. 2531, 81st Cong., 2d Sess. 4 (1950); H. R. Rep. No. 2935, 81st Cong., 2d Sess. 3 (1950).

fied in delaying action until an appraisal of the property was completed, without which depreciation and interest could not be accurately estimated.[29] The appraisal has now been finished and further delay cannot be justified on that ground.[30] It further suggests that the Korean War, pending legislation to alter §412, and the 1955 treaty with Panama have introduced "uncertainty rendering it unwise to change tolls at the present time." It has been five years since the new formula went into effect and almost two decades since the tolls were last changed. Uncertainty has become the norm in world affairs. The legislative policy is to make tolls reflect changes in these uncertainties, and not to suspend all changes until world conditions become static;[31] further delay is not an exercise of the defendant's conceded discretion to determine the frequency of toll changes, but an arbitrary refusal to obey the mandatory requirement of §412 that tolls be set in accord with costs,

III. Judicial Review of Administrative Non-Action

We thus reach the question of judicial review. Judge Walsh stated his conclusion that such review was not intended by Congress in several ways: failure to join the United States as an indispensable party; no standing to sue; inability to compel a government officer to exercise his discretion by writ of mandamus; and lack of finality in the defendant's action, which is subject to Presidential revision. On appeal defendant also suggests that a district court outside the District of Columbia lacks power to issue

[29] The defendant gives as its reason for not promulgating new tolls on its estimate of the property's value: "In view of the policy that tolls should remain stable over a period of years, it is evident that Congress did not intend tolls to be determined upon so tenuous and temporary a basis." Defendant Appellee's Brief, p. 42.

[30] *Id.* p. 43.

[31] See note 24 *supra*.

writs of mandamus, and that courts should not review the management of the public domain.

There is nothing in §§411 and 412 expressly authorizing or expressly precluding judicial review. Unless constitutional limitations exist, our power to grant relief in the premises is a matter of congressional will; and these various doctrines only point up relevant factors in our search for the silent legislative intent. We turn first to the problem of Presidential revision.

Defendant states, and we agree, that we have no power to review government decisions which are not final, and that tolls proposed by the defendant, but not yet approved by the President, lack the requisite finality. *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103; *Pan American Airways Co.* v. *C. A. B.*, 2 Cir., 121 F. 2d 810. In this suit, however, we are concerned not with proposed rate changes, but with the defendant's refusal to make such proposals—a decision which has finality and which is certainly effective without any approval by the President. The defendant's refusal to start the machinery for toll changes is like a court's refusal to start the process of adjudication by granting a defendant's motion to dismiss a complaint. Such a decision is a final order, although the opposite decision, denying the motion, would not be.

From the cases of *Chicago & Southern Air Lines* v. *Waterman S. S. Corp., supra*, 333 U. S. 103, and *Pan American Airways Co.* v. *C. A. B., supra*, 2 Cir., 121 F. 2d 810, the defendant argues that, where Congress establishes an agency whose decisions require Presidential approval, all judicial examination of the agency's action or inaction is precluded. But the cases will not support so broad a proposition. Both those cases dealt with the construction of §1006 of the Civil Aeronautics Act, 49 U. S. C. §646, which authorizes judicial review of certain orders of the Civil Aeronautics Board; and the decision of this court and the

Supreme Court was that the section did not authorize review of Board orders granting or denying citizen carriers' applications for certificates of convenience and necessity to engage in overseas and foreign air transportation. Justice Jackson, writing for the Supreme Court majority, did not state the sweeping proposition now urged to us, but listed the factors which led him to conclude that §1006 was not meant to include review of that type of agency decision: (1) Congress had expressly precluded judicial review of foreign carriers' applications to engage in foreign or overseas routes, suggesting a similar policy toward domestic carriers' applications of the identical kind; (2) air commerce, by virtue of its third dimension, novelty, and danger, poses special problems not present in the regulation of ship, truck, or train transportation; (3) aerial navigation routes and bases must be correlated with national defense plans and the conduct of foreign relations; (4) the express scheme for review of CAB decisions was to permit it where the Board performed conventional functions and to preclude it where the Board inverted the usual administrative process and acted as adviser to the President; (5) the President's role in the statutory plan was to coordinate legislative and executive powers to further the commercial, strategic, and diplomatic interests of this country in the realm of foreign affairs.

None of these considerations are present here. The defendant is a government corporation, expressly made suable on all its decisions without reservation. The subject matter being regulated—marine transportation—is familiar to the courts, as is the process of rate-making. The defendant's decisions are not complicated by factors of diplomacy or national defense, since the Hay-Pauncefote Treaty forbids use of the canal toll rate as a weapon of foreign policy. Accordingly the defendant's decisions will not involve national defense data and secret foreign intelligence,

as was the case under the Civil Aeronautics Act.[32] The CAB's standard of "convenience and necessity" was much more vague than the formula expressed in §412 to which the defendant corporation is to be held; and the type of CAB decisions discussed by the Supreme Court concerned the rate of expansion of the air transport industry, rather than, as here, the price to be paid by consumers to a government monopoly for services of a type frequently supplied by a public utility.[33]

It may be significant that review was sought in the case before the Supreme Court at a much later stage than here. There "submission of the Board's decision was made to the President, who disapproved certain portions of it and advised the Board of the changes which he required. The Board complied and submitted a revised order and opinion which the President approved. Only then were they made public, and that which was made public and which is before us is only the final order and opinion containing the President's amendments and bearing his approval." *Chicago & Southern Air Lines* v. *Waterman S. S. Corp., supra,* 333 U. S. 103, 110. It may well be that no judicial review would be possible once the defendant's original proposal has been altered to conform with the President's political decision,[34] but that question is not now before us.

Panama Canal Company claims that we cannot now ignore the question, however, since it would be irresponsible to mandamus the defendant to action which would then be

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[32] *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111-112. Unlike the present law, the statute before the Supreme Court provided that CAB decisions "shall be submitted to the President before publication thereof." 49 U. S. C. §601.

[33] At the time the present statute was passed the most comparable waterway was the Suez Canal, then privately-owned. The tolls policy in Suez was frequently compared with that in Panama, Hearings, *supra*, note 9, at 34, 37; Hearings, *supra*, note 16, at 69-70, 135, 137-138, 142; 96 Cong. Rec. 13373; and the international treaty incorporated in §412(d) of the present statute was modeled on that governing the Suez Canal. See note 14 *supra*.

[34] *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 112-114; but see *Shaughnessy* v. *Pedreiro*, 349 U. S. 48.

beyond judicial scrutiny. Assuming that this is true, it appears that in the normal situation tolls would be set by the defendant and approved by the President without alteration; there would then be no obstacle to court review. Although, on occasion, the President may intervene and thus preclude judicial review of the new rates, the mere possibility of frustration should not deprive the district court of the power to take the first step. See *Virginian R. Co.* v. *System Federation No. 40*, 300 U. S. 515; *Wilbur* v. *U. S. ex rel. Kadrie*, 281 U. S. 206, 218.

Nor is the defendant a mere adviser to the President of the type discussed in *United States* v. *George S. Bush & Co.*, 310 U. S. 371—a decision under the Tariff Act of 1930 (46 Stat. 590). The Act authorized the Tariff Commission to recommend increases in the statutory import duties if existing duties failed to equalize production costs of foreign and domestic articles. A recommendation to increase the duty on canned clams was approved by the President with the statutory finding that "in his judgment such rates of duty are shown by such investigation of the commission to be necessary to equalize such differences in costs of production." The Court of Customs and Patent Appeals, authorized to review "a question or questions of law only," held the increase invalid because in computing the cost of Japanese production the Commission and the President converted yen into dollars at the 1932 rate of exchange, instead of the rate of earlier years before Japan went off the gold standard. The Congress had deliberately failed to specify the year on which exchange rates should be computed, and the President's method of solving the problem was held nonreviewable by the Supreme Court. "Whatever may be the scope of appellate jurisdiction conferred by §501 of the Tariff Act of 1930, it certainly does not permit judicial examination of the judgment of the President that the rates of duty recommended by the Commission are

necessary to equalize the differences in the domestic and foreign costs of production." *United States* v. *George S. Bush & Co.*, *supra*, 310 U. S. 371, 379. The Court carefully limited its language to tariff acts, where for a century the President had been given wide discretion to make such decisions; and it noted that the Tariff Commission had traditionally acted as an adviser only, either to Congress or to the President. The differences between the background, subject matter, and language of the tariff statute and the present law dispel any inference that Congress intended the same scope of review for canal users as for importers of foreign commodities.

Even assuming the scope of review under that statute and this one to be the same, we think the Supreme Court would have allowed the Court of Customs and Patent Appeals to act in the event the Tariff Commission, like the present defendant, boldly refused to hold any hearings concerning rate changes despite adequate indications that changes were necessary to comply with the statutory formula. The present case would be more comparable to the *Bush* decision if the present plaintiffs were trying to declare new tolls invalid because of the type of depreciation computation chosen by the agency and approved by the President.

Before 1950 the President was authorized to set tolls, and the epithet "adviser" could properly be applied to the governor of The Panama Canal. But if the changes in §411 are to have any meaning the defendant is now the rate maker, and not a counselor. The legislative history similarly supports this.

As a last resort the defendant presses on us cases involving administration of the public domain;[35] but the

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[35] *E.g.*, *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474; *Butte City Water Co.* v. *Baker*, 196 U. S. 119, 126; *Alabama* v. *Texas*, 347 U. S. 272, 273; *United States* v. *San Francisco*, 310 U. S. 16, 29-30; *Light* v. *United States*, 220 U. S. 523, 537. *Cf.* Section 4 of the Administrative Procedure Act exempting from some rule making requirements "any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 60 Stat. 238, 5 U. S. C. §1003.

problems presented by them are far removed from those of a government corporation, organized on a commercial model, charging consumers for the type of services ordinarily supplied by private enterprise. Moreover, the public domain cases have no factor analogous to the treaty—the Hay-Pauncefote Treaty, *supra*—which here binds the government to conduct its venture in a fashion that will provide fair and equitable tolls for users of all lands. Compare *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 128, 129, which the defendant cites.

The growing tendency of the courts and Congress has been to submit more matters once thought to concern internal government administration to examination in open court. See, *e.g.*, *Honovich* v. *Chapman*, D. C. Cir., 194 F. 2d 761 (Secretary of the Interior's regulations concerning Indians' wills); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (Attorney-General's listing of organizations for use in screening government personnel); *Schachtman* v. *Dulles*, D. C. Cir., 225 F. 2d 938 (passport denial); *Textile Workers Union of America* v. *Allendale Co.*, D. C. Cir., 226 F. 2d 765 (Walsh-Healey Act determinations reviewable under the Fulbright Amendment, 66 Stat. 308, 41 U. S. C. §43a, which overruled *Perkins* v. *Lukens Steel Co.*, *supra*, 310 U. S. 113); Administrative Procedure Act, 5 U. S. C. §1009(c), "every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." We think the intent of Congress was to allow judicial review in these circumstances.

Nor is there any lack of standing to sue. Section 10(a) of the Administrative Procedure Act, 5 U. S. C. §1009(a), confers standing on persons "suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute," and the plaintiffs can point to the Panama Canal Act of 1912,

as amended in 1951, as well as the Hay-Pauncefote Treaty as their statutory authority. Moreover, without legislation they have a right to judicial redress, since the corporation's action in charging tolls in excess of the statutory rate was "of a sort that, if taken by a private person, would create a right of action cognizable by the courts."[36] *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, 341 U. S. 123, 152 (concurring opinion of Justice Frankfurter).

Here there is no controversy over the proper person to sue; all users of the canal have been joined in a single class action. The question is rather whether or not there is to be judicial review, since a finding of no standing here means that the courts have no power in the premises. See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, 341 U. S. 123, 186 (concurring opinion of Justice Jackson). From all that has gone before we conclude that court relief was not precluded and that the plaintiffs may seek it.

A final argument is made that legislative and executive supervision is sufficient and that judicial interference will prove cumbersome. The President's power to remove members of the defendant's board of directors and his veto power are stressed in this connection, as well as the supervisory power wielded by Congress through annual appropriation bills. But identical balances and checks rein most government agencies, whose decisions are nevertheless subject to judicial scrutiny. For the person unable to get redress from the busy legislature or White House the courts remain open.

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[36] The right of a consumer to sue a utility which charges excessive tolls is established, *e.g.*, *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436; *United States* v. *Public Utilities Commission of District of Columbia*, D. C. Cir., 151 F. 2d 609; *Richman* v. *Consolidated Gas Co. of New York*, 114 App. Div. 216, 100 N. Y. S. 81, affirmed 186 N. Y. 209, 78 N. E. 871.

Appendix A

(Court of Appeals Opinion)

IV. The United States as Indispensable Party

The holding that the United States was an indispensable party applies, as we understand the opinion below, only in so far as the plaintiffs seek to recover money from the defendant, and not to the request for injunctive or mandamus relief. We do not pass on the necessity for joining the United States as defendant, since we think a money recovery is precluded by other considerations. Restitution of overcharges would require determination of the tolls that should have been set. Although the district court might reconstruct the tolls which the defendant corporation should have promulgated, there is no way of knowing whether or not the President would have approved them. Moreover, there is no statutory authority for utilizing the defendant's facilities for measuring the amount of money to be awarded the plaintiffs in suits to recover overcharges. See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 253-255. We find no evidence of a congressional intent to allow recovery of overcharges.

V. Availability of the Remedy of Mandatory Injunction

Panama Canal Company's last argument rests on the doctrine that federal courts outside the District of Columbia lack statutory authority to issue writs of mandamus against government officers in the exercise of their original jurisdiction. *McIntire* v. *Wood*, 11 U. S. 504, 7 Cranch 504; *Rosenbaum* v. *Bauer*, 120 U. S. 450; *Knapp* v. *Lake Shore & M. S. R. Co.*, 197 U. S. 536; *Covington & C. Bridge Co.* v. *Hager*, 203 U. S. 109. The lower federal courts have not been consistent in handling efforts to avoid this doctrine by actions for mandatory injunctions or declaratory judgment;[37] but we need not review those cases, since the

[37] See Note, 38 Col. L. Rev. 903 (1938).

McIntire line of cases is inapplicable to an action like the present one against a corporation, *Virginian R. Co.* v. *System Federation No. 40, supra,* 300 U. S. 515, affirming 4 Cir., 84 F. 2d 641, 646. The present situation is even more favorable for issuing a mandatory injunction, since by congressional legislation the defendant was made suable in New York, rather than in the District of Columbia.

We conclude that the judgment of dismissal for the defendant should be reversed and summary judgment should be entered for the plaintiffs on their motion therefor to the extent set forth in, and in accordance with, this opinion.

Reversed and remanded for judgment for the plaintiffs.

APPENDIX B

Stay Memorandum of Justice Harlan*

[May 7, 1957.]

MR. JUSTICE HARLAN, Associate Justice.

This is an application by the Panama Canal Company, a government instrumentality, for a stay of the mandate of the Court of Appeals, pending determination by the Solicitor General as to whether certiorari should be sought to review the decision below and pending further proceedings in this Court, if certiorari is applied for. The Assistant Attorney General in charge of the case has advised me that he has recommended to the Solicitor General that a petition for certiorari be filed.

The controversy relates to the duties of the petitioner, Panama Canal Company, under the Act of September 26, 1950, 64 Stat. 1038, with respect to establishing tolls for the use of the Canal. The District Court dismissed the complaint, considering that the court had no jurisdiction of the subject matter of the suit, and that the respondent steamship companies had no standing to sue. The Court of Appeals reversed as to the jurisdictional question, and as to the merits, granted summary judgment in favor of the steamship companies. The effect of that decision, as both sides seem to agree, is (a) to require the Panama Canal Company to proceed with a revision of the Canal tolls, in accordance with the Court of Appeals' construction of the 1950 Act, and the accounting views of the General Accounting Office, whose correctness is disputed by the Panama Canal Company; and (b) to deny the steamship companies recovery for excessive past rates, if the revised tolls should turn out to be lower. The Court of Appeals (Chief Judge Clark and Judge Hincks) denied

* The memorandum of May 7 sets forth in a footnote the memorandum of the Court of Appeals denying a stay (Appx. B, 26). The memorandum of May 7 is presented as amended by a supplemental memorandum of May 16.

petitioner's application for a stay pending review by this Court.*

After hearing the parties and considering their memoranda. I am of the opinion that a stay should issue. Without intimating any views as to the merits, I think the character of the questions involved is such that it cannot be said that it is unlikely that certiorari will be granted. While I recognize the force of the steamship companies' argument that if the decision of the Court of Appeals ultimately stands, the companies will have no recourse for alleged excessive tolls paid by them during the period of a stay, I regard the strength of this contention as being outweighed by the undesirability of requiring the Panama Canal Company to go forward with revamping its entire toll structure, until its duty to do so, and the principles on which it should proceed, are finally adjudicated in this litigation. Apart from all else, the fixing of such tolls is not alone a commercial undertaking, but also one that involves this country's relations with the foreign governments whose nationals are users of the Canal.

I am constrained to accept the Government's representations that the uncertainties and confusion which might ensue from requiring the Panama Canal Company to proceed before this litigation is over might embarrass our relations with such foreign governments. And because of the peculiar position occupied by the Panama Canal Company as a political instrumentality, it seems to me

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*The memorandum of the Court of Appeals is as follows: "Motion denied. In view of the heavy accumulating loss to plaintiffs by defendant's failure to perform what this court holds to be its legal obligation and of the ease with which it can seek interim relief from the Supreme Court or a Justice thereof if we are in error, a stay of the mandate to prevent even a beginning in the lengthy steps necessary towards compliance with the court's order is not in the interest of justice."

Appendix B

(Stay Memorandum of Justice Harlan)

that it should not be required to go forward under the Court of Appeals' decision until the issues in this controversy are settled. I think the particular interim interests of these steamship companies must yield to the broader concerns involved in having this litigation proceed to an orderly final conclusion.

I am informed by respondents that they have ascertained that the mandate of the Court of Appeals has gone to the District Court. I shall therefore stay all further proceedings under that mandate pending the filing and determination of the petitioner's petition for certiorari in this Court, upon condition, however, that the petition for certiorari is filed within the time prescribed by law. 28 U. S. C. §2101 (c).

May 7, 1957.

APPENDIX C

Statutes Involved

Constitution of the United States:

ARTICLE I.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

ARTICLE II.

Section 1. The executive Power shall be vested in a President of the United States of America * * *

Section 3. He * * * shall take Care that the Laws be faithfully executed * * *

ARTICLE IV.

Section 3. * * * The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *

Act of June 29, 1948 (62 Stat. 1075-1077):

Section 2 of the Act of June 29, 1948, by enacting Section 245, Title 2, Canal Zone Code, declares defendant to be an "agency and instrumentality of the United States."

Section 2, by enacting Section 245, also provides that:

> "Within the meaning of the laws of the United States relating to venue in civil actions, the corporation shall be deemed to be an inhabitant both of the southern judicial district of New York and of the Canal Zone."

Section 2, by enacting Section 247, declares defendant to be a corporation which "may sue and be sued in its corporate name."

Appendix C

(Statutes Involved)

Section 2 also enacted Section 253 as follows:

"253. PAYMENT OF EXCESS FUNDS INTO THE TREASURY. The board of directors shall have the power and duty to appraise, at least annually, its necessary working capital requirements, together with reasonable foreseeable requirements for authorized plant replacement and expansion, and to pay into the Treasury as dividends the amount of funds in excess thereof. Such dividends shall be treated by the Treasury as miscellaneous receipts, but shall be treated on the books of the corporation as applicable to reduction of past or future direct Government capital contributions (as provided in section 246(d) of this title) in determining the base for interest payments required under section 246(c)."

Act of September 26, 1950 (64 Stat. 1038-1043):

SEC. 2. (a) Except as otherwise provided in, or where inconsistent with, the provisions of this Act—

(1) the terms 'the Panama Canal,' 'the Canal,' and 'the Canal authorities,' wherever appearing in the statutes of the United States and having reference, prospectively, to the agency heretofore known by those names, are amended to read 'the Canal Zone Government'; and

(2) the term 'the Panama Railroad Company' wherever appearing in the statutes of the United States and having reference, prospectively, to the corporation heretofore known by that name, is amended to read 'the Panama Canal Company'.

* * * * * * *

SEC. 10. Article 3 of chapter 12 of title 2, Canal Zone Code, as added by the Act of June 29, 1948, is amended by renumbering sections 255 and 256 of said title 2 as sections 257 and 258, respectively, and by adding, in said article 3, two new sections numbered 255 and 256 and reading as follows: * * *

Appendix C

(Statutes Involved)

"256. AUTHORIZATION FOR TRANSFER OF PANAMA CANAL TO CORPORATION.—The President is hereby authorized to transfer to the corporation the Panama Canal, together with the facilities and appurtenances related thereto, and any or all of the facilities and appurtenances heretofore maintained and operated by the Panama Canal under authority of section 51 of title 2 of the Canal Zone Code, as amended by section 2 of the Act of August 12, 1949 (ch. 422, 63 Stat. 601), and all or so much as he may determine to be necessary of the personnel, property, records, related assets, contracts, obligations, and liabilities of or appertaining to the said Canal and the aforesaid facilities or appurtenances, and such transfer shall be deemed to have been accepted and assumed by the corporation without the necessity of any act or acts on the part of the corporation except as otherwise stipulated in the provisions of section 246 of this title."

SEC. 11. Section 411 of title 2 of the Canal Zone Code is amended to read as follows:

"411: AUTHORITY TO PRESCRIBE MEASUREMENT RULES AND TOLLS.—The Panama Canal Company is authorized to prescribe and from time to time change (1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following, the tolls that shall be levied for the use of the Panama Canal: *Provided, however,* That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: *Provided further,* That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in basic rules of measurement and of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: *And provided further,* That

changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive."

SEC. 12. Section 412 of title 2 of the Canal Zone Code, as amended by the Act of August 24, 1937 (ch. 752, 50 Stat. 750), is amended to read as follows:

"412. BASES OF TOLLS.—(a) Tolls on merchant vessels, army and navy transports, colliers, tankers, hospital ships, supply ships, and yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the rules for the measurement of vessels for the Panama Canal, and tolls on other floating craft shall be based on displacement tonnage. The rate of tolls on vessels in ballast without passengers or cargo may be less than the rate of tolls for vessels with passengers or cargo.

"(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

"(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the

United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended.

"(d) The levy of tolls is subject to the provisions of section 1 of article III of the treaty between the United States of America and Great Britain concluded on November 18, 1901, of articles XVIII and XIX of the convention between the United States of America and the Republic of Panama concluded on November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Columbia proclaimed on March 30, 1922.

"(e) Capital investment for interest purposes shall not include any interest during construction. * * *"

* * * * * * *

SEC. 14. Except for section 256 of title 2 of the Canal Zone Code, as added by section 10 of this Act, this Act shall take effect upon the effective date of the transfer to the corporation, pursuant to the provisions of said section 256, of the Panama Canal together with the facilities and appurtenances related thereto.

Administrative Procedure Act (5 U. S. C. §1001, 1009):

By Section 10(a) "any person suffering legal wrong" because of "agency action" is "entitled to judicial review."

By Section 2(g) "agency action" is defined to include "failure to act."

By Section 10(b) "the form of proceeding" may be "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction * * *) in any court of competent jurisdiction."

By Section 10(e) the Court "shall (A) compel agency action unlawfully withheld or unreasonably delayed."

Title 28, United States Code (Judicial Code), §1331:

> §1331. *Federal question; amount in controversy.*
>
> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Treaty between the United States of America and Great Britain concluded on November 18, 1901 (Hay-Pauncefote Treaty), 33 Stat. 1903, Article III, Section 1:

> The United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:
>
> 1. The canal shall be free and open to the vessels of commerce and war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

Appendix C

(Statutes Involved)

Executive Order No. 10263 (16 F. R. 6333):

SECTION 1. There are hereby transferred to the Panama Railroad Company, a corporate agency and instrumentality of the United States which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Panama Canal Company, (a) the Panama Canal (the waterway), together with all the facilities, buildings, structures, and improvements related thereto, and (b) all other facilities, buildings, structures, and improvements whatsoever now maintained and operated by The Panama Canal, an independent agency of the United States, which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Canal Zone Government: *Provided, however,* that there are excepted from such transfer the following-described facilities, buildings, structures, and improvements, situated on the Isthmus of Panama, which shall be for use and administration by the agency which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Canal Zone Government: . . .

SEC. 8. This order shall become effective on July 1, 1951.

APPENDIX D

Prior Statutes Providing for the Prescription of Panama Canal Tolls

There follow the successive statutes relating to the prescription of Panama Canal tolls. This historical review demonstrates a pattern by which the President was designated to prescribe tolls, but commanded to do so in accordance with a defined policy, a policy which afforded some administrative discretion.

Act of August 24, 1912 (37 Stat. 560, 562-3).

SECTION 5. That the President is hereby authorized to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal: *Provided*, That no tolls, when prescribed as above, shall be changed, unless six months' notice thereof shall have been given by the President by proclamation. No tolls shall be levied upon vessels engaged in the coastwise trade of the United States * * *

Tolls may be based upon gross or net registered tonnage, displacement tonnage, or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce. The rate of tolls may be lower upon vessels in ballast than upon vessels carrying passengers or cargo. When based upon net registered tonnage for ships of commerce the tolls shall not exceed one dollar and twenty-five cents per net registered ton, nor be less, other than for vessels of the United States and its citizens, than the estimated proportionate cost of the actual maintenance and operation of the canal, subject, however, to the provisions of article nineteen of the convention between the United States and the Republic of Panama, entered into November eighteenth, nineteen hundred and three. If the tolls shall not be based upon net registered tonnage, they shall not exceed the equivalent of one dollar and twenty-five cents

per net registered ton as nearly as the same may be determined, nor be less than the equivalent of seventy-five cents per net registered ton. The toll for each passenger shall not be more than one dollar and fifty cents.

Act of June 15, 1914 (38 Stat. 385-6).

SECTION 1. That the second sentence in section five of the Act entitled "An Act to provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone," approved August twenty-fourth, nineteen hundred and twelve, which reads as follows: "No tolls shall be levied upon vessels engaged in the coastwise trade of the United States," be, and the same is hereby, repealed.

SECTION 2. That the third sentence of the third paragraph of said section of said Act be so amended as to read as follows: "When based upon net registered tonnage for ships of commerce the tolls shall not exceed $1.25 per net registered ton, nor be less than 75 cents per net registered ton, subject, however, to the provisions of article nineteen of the convention between the United States and the Republic of Panama, entered into November eighteenth, nineteen hundred and three."

Act of June 19, 1934, Adopting the Canal Zone Code (48 Stat. 1122).

Title 2:

SECTION 411. *Authority of President to prescribe and change tolls.*—The President is authorized, subject to the provisions of the section next following, to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal, but no tolls when prescribed as above shall be

changed unless six months' notice thereof is given by the President by proclamation.

SECTION 412. *Bases of tolls; maximum and minimum rates.*—Tolls may be based upon gross or net registered tonnage, displacement tonnage, or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce.

The rate of tolls may be lower upon vessels in ballast than upon vessels carrying passengers or cargo.

When based upon net registered tonnage for ships of commerce the tolls shall not exceed $1.25 per net registered ton, nor be less than 75 cents per net registered ton, subject, however, to the provisions of article 19 of the convention between the United States and the Republic of Panama, entered into November 18, 1903.

If the tolls are not based upon net registered tonnage, they shall not exceed the equivalent of $1.25 per net registered ton as nearly as the same may be determined, nor be less than the equivalent of 75 cents per net registered ton.

The toll for each passenger shall not be more than $1.50.

Act of August 24, 1937, Amending Section 412, Title 2, of the Canal Zone Code (50 Stat. 750).

SECTION 412. *Bases of tolls, measurement rules; maximum and minimum rates.*—Tolls on merchant vessels, army and navy transports, colliers, hospital ships, supply ships, and yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the Rules for the Measurement of Vessels for the Panama Canal prescribed by the President and as may be modified by him from time to time by proclamation, and tolls on other floating craft shall be based on displacement tonnage: *Provided,* That the basic rules of measure-

ment shall not be changed except after public hearing and six months' public notice of such change. The rate of tolls on laden vessels shall not exceed $1, nor be less than $0.75 per net vessel-ton as determined under the aforesaid rules, and on vessels in ballast without passengers or cargo the rate may be less than the rate of tolls for vessels with passengers or cargo. In addition to the tolls based on measurement or displacement tonnage, tolls may be levied on passengers at rates not to exceed $1.50 for each passenger. The levy of tolls is subject to the provisions of article XIX of the convention between the United States of America and the Republic of Panama, entered into November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Colombia proclaimed March 30, 1922.

APPENDIX E

The Report of the House Merchant Marine Committee on H. R. 8677, the Bill That Became the Act of September 26, 1950.

HOUSE OF REPRESENTATIVES

81st Congress) (Report
2d Session) (No. 2935

AUTHORIZING AND PROVIDING FOR THE MAINTENANCE AND OPERATION OF THE PANAMA CANAL BY THE PRESENT CORPORATE ADJUNCT OF THE PANAMA CANAL, AS RENAMED; TO RECONSTITUTE THE AGENCY CHARGED WITH THE CIVIL GOVERNMENT OF THE CANAL ZONE.

August 16, 1950.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

MR. O'TOOLE, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

[To accompany H. R. 8677]

The bill is designed to implement recommendations of the Bureau of the Budget and of the President with respect to the organization and operation of the Panama Canal.

* * * * * * *

The recommendations contemplate (*a*) that in the organization of the Canal, transit and business functions should be separated from civil government functions; (*b*) that such transit and business functions should be operated on

a business basis by the Panama Railroad Company, renamed the "Panama Canal Company," and that civil government functions (including health and sanitation) should be performed by "the Canal Zone government"; (*c*) that tolls for commercial ships should be related to transit costs, including interest on Government investment in the Canal and a fair share of the net cost of health, sanitation, and civil government; (*d*) that free transits of Government ships should be eliminated; and (*e*) that the net appropriated cost of operation of the "Canal Zone government" should be reimbursed to the Treasury by the corporation, such reimbursement being proportionately charged to the various corporate divisions (e. g., railroad, steamship, commissary, etc.) on an equitable basis.

As reported by your committee the bill would be confined to the recommendations of the Bureau of the Budget and of the President. * * * The net cost of Canal Zone civil government would be borne from appropriations which would be reimbursed to the Treasury by the Company currently, or where necessary, over a longer period. The Company, in turn, would allocate the net cost of the Canal Zone Government against each of the corporate divisions. * * *

The bill as introduced would require that in the determination of the share of the net cost of health, sanitation, and civil government to be borne by tolls, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated gross revenues of the corporation, exclusive of the cost of commodities resold and exclusive of revenues arising from transactions within the corporation or from transactions with the Canal Zone Government.

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Your committee is informed that the resulting allocation is expected currently to assess approximately an equal

division of the expense of health, sanitation, and civil government between the transit division and other corporate divisions. While the method of allocation contained in the bill is not the only possible method, it has the merit of simplicity and on the basis of information furnished the committee produces a reasonable and practical result.

It is generally agreed that in calculating the toll rate there should be excluded from the capital base all investment in equipment and structures, of business operations which are not directly related to operation of the Canal, all health, sanitation, and civil government facilities and equipment. Capital of each corporate division should also be reduced by a proportionate share of past net corporate repayments to the Treasury in excess of government investment pursuant to the provisions of Public Law 808 (80th Cong.). After these exclusions there would remain an item of $129,000,000 of interest which, accrued during construction of the Canal, and the amount was added to the Canal accounts by administrative determination in 1932 and represents a computation of the amount of interest compounded at 3 percent on funds appropriated between 1904 and 1920.

There is precedent for the exclusion of interest during construction from the capital investment of the Canal upon which interest is to be charged against toll revenues. Such interest during construction is not included in the capital accounts of the Tennessee Valley Authority and rates for power sold by the Authority are not computed to recover it.

Your committee has amended the bill to exclude interest during construction from the capital base for interest to be included in the tolls base. Such exclusion is recommended not only because of precedent but as a just and reasonable recognition of the defense value of the Canal, and as an offset against the operations which have been conducted and which, to some extent, will be conducted in the future, without reimbursement; for the Military Establishment or others in the interest of the United States. The amount

thus excluded approximates that which was found, pursuant to direction of a special Commission appointed by the Secretary of War in 1921, to represent the capital cost of the Canal allocable to defense. Your committee notes that, for the past 30 years, there has been much argument as to whether the Canal was constructed for defense or commercial needs. Your committee is of the opinion that exclusion of interest during construction from the corporation's toll base is a reasonable recognition of the Canal's defense value, and that such exclusion will obviate argument on this issue in the future.

Your Committee believes that legislation reorganizing the Panama Canal and establishing tolls policy has long been needed. Since it will require at least a year to effect the changes proposed by the bill it is recommended that this legislation be given early consideration.